

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LINDA L. GRANT-FRAYER,	)	
	)	No. CV-04-0283-CI
Plaintiff,	)	
	)	ORDER GRANTING IN PART
v.	)	PLAINTIFF'S MOTION FOR SUMMARY
	)	JUDGMENT AND REMANDING FOR
JO ANNE B. BARNHART,	)	ADDITIONAL PROCEEDINGS
Commissioner of Social	)	PURSUANT TO SENTENCE FOUR OF
Security,	)	42 U.S.C. § 405(G)
	)	
Defendant.	)	
	)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 12), submitted for disposition without oral argument on April 2, 2005. Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and **REMANDS** for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

Plaintiff, who was 51-years-old at the time of the administrative decision, filed applications for Social Security disability benefits and Supplemental Security Income benefits on

1 August 4, 1999, alleging onset as of November 30, 1996, due to  
2 degenerative disc disease and hepatitis C. (Tr. at 29.) Plaintiff  
3 completed the eleventh grade and never obtained a GED. She had past  
4 relevant work as a waitress and cashier. Following a denial of  
5 benefits and reconsideration, a hearing was held before ALJ Stanley  
6 Hogg (ALJ). The ALJ denied benefits on May 24, 2001. Three years  
7 later, review was denied by the Appeals Council. (Tr. at 22-24.)  
8 This appeal followed. Jurisdiction is appropriate pursuant to 42  
9 U.S.C. § 405(g).

#### 10 ADMINISTRATIVE DECISION

11 The ALJ concluded Plaintiff met the disability insured  
12 requirements through the date of his decision.<sup>1</sup> She had not engaged  
13 in substantial gainful activity due to severe impairments including  
14 degenerative disc disease, but that impairment was not found to meet  
15 the Listings. The ALJ also concluded the hepatitis, headaches,  
16 fatigue and nausea were non-severe. (Tr. at 29.) The ALJ concluded  
17 Plaintiff's testimony was not fully credible and that she retained  
18 the residual capacity to perform light work. (Tr. at 33.) He  
19 concluded Plaintiff was able to perform her past relevant work as a  
20 cashier at a gas station, as she performed it at the sedentary  
21 level. Thus, there was no finding of disability.

#### 22 ISSUES

23 The question presented is whether there was substantial  
24 evidence to support the ALJ's decision denying benefits and, if so,  
25 whether that decision was based on proper legal standards. Plaintiff

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26 <sup>1</sup>Administrative records indicate the date of last insured was  
27 December 31, 2001. (Tr. at 68.)  
28

1 asserts the ALJ erred when he (1) improperly rejected the opinion of  
2 the treating physician and relied on the findings of the consulting  
3 physician, and (2) improperly rejected her testimony as not fully  
4 credible.

#### 5 STANDARD OF REVIEW

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
7 court set out the standard of review:

8 The decision of the Commissioner may be reversed only if  
9 it is not supported by substantial evidence or if it is  
10 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
11 1097 (9th Cir. 1999). Substantial evidence is defined as  
12 being more than a mere scintilla, but less than a  
13 preponderance. *Id.* at 1098. Put another way, substantial  
14 evidence is such relevant evidence as a reasonable mind  
15 might accept as adequate to support a conclusion.  
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
17 evidence is susceptible to more than one rational  
18 interpretation, the court may not substitute its judgment  
19 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
20 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599  
(9th Cir. 1999).

21 The ALJ is responsible for determining credibility,  
22 resolving conflicts in medical testimony, and resolving  
23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
24 Cir. 1995). The ALJ's determinations of law are reviewed  
25 *de novo*, although deference is owed to a reasonable  
26 construction of the applicable statutes. *McNatt v. Apfel*,  
27 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 28 SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
requirements necessary to establish disability:

Under the Social Security Act, individuals who are  
"under a disability" are eligible to receive benefits. 42  
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
medically determinable physical or mental impairment"  
which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
from "anatomical, physiological, or psychological  
abnormalities which are demonstrable by medically

1 acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a  
 2 claimant will be eligible for benefits only if his  
 3 impairments "are of such severity that he is not only  
 4 unable to do his previous work but cannot, considering his  
 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 5 the definition of disability consists of both medical and  
 vocational components.

6  
 7 In evaluating whether a claimant suffers from a  
 disability, an ALJ must apply a five-step sequential  
 inquiry addressing both components of the definition,  
 8 until a question is answered affirmatively or negatively  
 in such a way that an ultimate determination can be made.  
 9 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 claimant bears the burden of proving that [s]he is  
 10 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 11 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 12 404.1512(a)-(b), 404.1513(d)).

### 13 ANALYSIS

#### 14 1. Treating Physician

15 Plaintiff asserts the ALJ failed to properly reject the  
 16 opinions of her treating physician, Dr. Charles White, who diagnosed  
 17 degenerative disc disease that was treated conservatively for  
 18 several years. Plaintiff further contends Dr. White made several  
 19 objective findings in 1997, treated her every two to three months  
 20 after that, and did an evaluation with consistent objective findings  
 21 in August 2000. Moreover, Plaintiff asserts the ALJ failed to  
 22 describe what weight, if any, he gave to Dr. White's opinions.

23 In a disability proceeding, the treating physician's opinion is  
 24 given special weight because of his familiarity with the claimant  
 25 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05  
 26 (9th Cir. 1989). If the treating physician's opinions are not  
 27 contradicted, they can be rejected only with "clear and convincing"

1 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If  
2 contradicted, the ALJ may reject the opinion if he states specific,  
3 legitimate reasons that are supported by substantial evidence. See  
4 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463  
5 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating  
6 physician's uncontradicted medical opinion will not receive  
7 "controlling weight" unless it is "well-supported by medically  
8 acceptable clinical and laboratory diagnostic techniques," Social  
9 Security Ruling 96-2p, it can nonetheless be rejected only for  
10 "'clear and convincing' reasons supported by substantial evidence in  
11 the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.  
12 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.  
13 1998)). Historically, the courts have recognized conflicting  
14 medical evidence, the absence of regular medical treatment during  
15 the alleged period of disability, and the lack of medical support  
16 for doctors' reports based substantially on a claimant's subjective  
17 complaints of pain, as specific, legitimate reasons for disregarding  
18 the treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64;  
19 *Fair*, 885 F.2d at 604. Here, Dr. White's opinion as to Plaintiff's  
20 residual functional capacity (disabled) is contradicted by the  
21 findings of the examining orthopedist, Dr. Scaduto, who concluded  
22 Plaintiff was able to perform medium work. Thus, specific,  
23 legitimate reasons are necessary to reject Dr. White's opinion.

24 The ALJ, in his opinion, made the following observations and  
25 findings with respect to Dr. White's opinion:

26 Dr. White issued a medical source statement dated August  
27 4, 2000, stating the claimant is precluded from sitting,  
standing and walking for more than one hour with change in  
28 position every 15 minutes and should lift and carry no

1 more than five pounds occasionally. He also indicated the  
2 claimant should be limited to low stress in the workplace.  
3 The undersigned does not credit this conclusion of the  
4 claimant's limitations as the record shows Dr. White based  
5 this assessment on several treatments in 1997; however, he  
6 only treated the claimant one time in 1998, a few times in  
7 1999 and only this one time in 2000. He saw her many  
8 times in 1996, however, there were no neurological  
9 findings. It appears that at most straight leg raising  
10 was negative, including neurology records and on most  
11 occasions there are no neurological deficits. Dr. White's  
12 own findings show normal motor sensory and reflexes, no  
13 weakness or atrophy, normal gait with minimal muscle spasm  
14 and tenderness. Dr. White's assessment seems to rely  
15 heavily on the claimant's "excruciating" pain, yet the  
16 claimant's information on the daily activities  
17 questionnaire and testimony at the hearing do not indicate  
18 such severe pain.

19 (Tr. at 30-31.) These findings are specific and legitimate and  
20 supported by the medical record.

21 Medical records and clinical notes from Dr. White and his  
22 office are difficult to read; nonetheless, the court's review of  
23 those records establishes Plaintiff suffered from degenerative disc  
24 disease at L2-3, L3-4, and L4-5, confirmed by x-ray and MRI (Tr. at  
25 127, 192, 209, 318), that she required twice daily doses of Vicodin  
26 continuing from 1996 through 2000 for relief from back pain (Tr. at  
27 189, 238, 263, 301), and that her daily activities were limited.  
28 Additionally, in June 1999, Plaintiff was referred to a neurosurgeon  
who did not recommend surgery, but saw her for a six month time  
frame (January to August 1997) for continued conservative treatment.  
(Tr. at 114, 123.)

The ALJ relied, in part, on an examination and findings by  
orthopedist Anthony Scaduto, M.D., dated October 3, 1999. Plaintiff  
complained to him of low back pain for the past six years, but  
denied bowel or bladder incontinence, lower extremity weakness or

1 paresthesias. (Tr. at 201.) Plaintiff was able to rise easily from  
2 the examining table, walked without a limp or walking aids, and was  
3 able to heel and toe walk without problem. (Tr. at 203.) She had  
4 negative straight leg raising bilaterally with some reduced range of  
5 motion in flexion and extension. However, her right and left  
6 lateral bending was within normal limits as were all tests of her  
7 knees, hips, and ankles, sensation and reflexes. (Tr. at 204-205.)  
8 Dr. Scaduto concluded Plaintiff would be able to perform medium  
9 work, with infrequent bending, crouching, stooping and squatting.  
10 (Tr. at 207.) An examining physician's opinion based on independent  
11 clinical findings can constitute substantial evidence. *Magallanes*  
12 *v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

13 Three days after Dr. Scaduto's written assessment, an x-ray  
14 noted advanced spondylotic changes present at L4-5. (Tr. at 209.)  
15 These additional findings were noted in the residual functional  
16 capacity assessment completed on January 25, 2000, by a consulting  
17 physician who limited Plaintiff to light work with only occasional  
18 climbing, balancing, stooping, kneeling, crouching, and crawling.  
19 (Tr. at 225.) Findings may be based in part on the testimony of a  
20 non-treating, non-examining medical advisor, when consistent with  
21 other independent evidence in the record. *Morgan v. Apfel*, 169 F.3d  
22 595, 602 (9th Cir. 1999). Here, the RFC was, in part, consistent  
23 with Dr. Scaduto's examination; to the extent it differed from Dr.  
24 Scaduto's assessment, the conclusion (as to light work rather than  
25 medium) was in Plaintiff's favor.

26 It was not until August 2000 that Dr. White concluded  
27 Plaintiff was disabled, based on his concurrent findings of  
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1 tenderness and muscle spasm on the right side, positive straight leg  
2 raising on the right side to thirty degrees, and radiation of pain  
3 to the right gluteal area.<sup>2</sup> (Tr. at 234.) However, as noted by the  
4 ALJ, Dr. White treated Plaintiff very infrequently in 1999 (four  
5 appointments), and 2000 (two appointments). (Tr. at 134, 136, 214,  
6 215, 241, 247.) Dr. White did not include examination findings  
7 related to Plaintiff's back condition at any of those appointments.  
8 Thus, the ALJ's reasons for rejecting Dr. White's assessment of  
9 disability were specific and legitimate and supported by the record.

10 2. Credibility

11 Plaintiff asserts the ALJ did not reject her testimony with  
12 clear and convincing reasons supported by the record. She further  
13 contends her limited daily activities were consistent with  
14 disability related to a back condition. The ALJ made the following  
15 findings as to Plaintiff's credibility:

16 The claimant testified that she can sit, stand and walk  
17 for 15 minutes; however, she reports she sits and watches  
18 TV about four hours a day, can watch a one-hour show,  
19 getting up during commercial breaks. She stated she does  
20 dishes and takes out the trash, lifting no more than eight  
pounds. She testified that she drives everyday to the  
library and spends time there reading cook books. She  
drives for 20 minutes to visit her mother three times a  
week for three hours. She testified when she is tired and

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21 <sup>2</sup>Plaintiff was also treated for hepatitis C, but the medical  
22 notes reflect no limitations noted by the treating physician with  
23 respect to this condition. A liver biopsy / pathology report dated  
24 March 2000 indicated chronic viral hepatitis C with minimal portal  
25 inflammation without active interface or lobular hepatitis,  
26 consistent with inactive chronic viral hepatitis C. (Tr. at 258.)  
27 Plaintiff refused interferon treatments. (Tr. at 247.)  
28



1 that she may nap in the afternoon about three times a  
2 week. She stated that she is unable to work eight hours  
3 a day and could not alternately sit and stand due to side  
4 effects of pain medication: drowsiness, dry mouth and  
5 nausea that has not been reported to treating physicians.  
6 She is able to shop for groceries once a week, can do  
7 light laundry and housekeeping. She enjoys watching  
8 videos, doing crossword puzzles and talking on the phone.  
9 She does not have sleep problems or trouble concentrating.  
10 At the hearing and on the daily activities report she  
11 stated that sometimes she just gets tired and stops  
12 working, while sometimes her back is hurting and she stops  
13 working. This raises the question of whether or not she  
14 has constant pain. The undersigned finds that the  
15 claimant's daily activities do not coincide with Dr.  
16 White's assessment dated August 4, 2000. There is no  
17 medical evidence to support such limitations and I find no  
18 basis for sitting, standing and walking limitations.

19 (Tr. at 31, references to exhibits omitted.)

20 In deciding whether to admit a claimant's subjective symptom  
21 testimony, the ALJ must engage in a two-step analysis. *Smolen v.*  
22 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,  
23 see *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the  
24 claimant must produce objective medical evidence of underlying  
25 "impairment," and must show that the impairment, or a combination of  
26 impairments, "could reasonably be expected to produce pain or other  
27 symptoms." *Id.* at 1281-82. If this test is satisfied, and if there  
28 is no evidence of malingering, then the ALJ, under the second step,  
may reject the claimant's testimony about severity of symptoms with  
"specific findings stating clear and convincing reasons for doing  
so." *Id.* at 1284. The ALJ may consider the following factors when  
weighing the claimant's credibility: "[claimant's] reputation for  
truthfulness, inconsistencies either in [claimant's] testimony or  
between [his/her] testimony and [his/her] conduct, [claimant's]  
daily activities, [his/her] work record, and testimony from

1 physicians and third parties concerning the nature, severity, and  
2 effect of the symptoms of which [claimant] complains." *Light v. Soc.*  
3 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's  
4 credibility finding is supported by substantial evidence in the  
5 record, the court may not engage in second-guessing. *See Morgan v.*  
6 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If  
7 a reason given by the ALJ is not supported by the evidence, the  
8 ALJ's decision may be supported under a harmless error standard.  
9 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990) (applying the  
10 harmless error standard); *Booz v. Sec'y of Health and Human Serv.*,  
11 734 F.2d 1378, 1380 (9th Cir. 1984) (same). Here, there is no  
12 evidence of malingering; thus, the ALJ's reasons must be clear and  
13 convincing. Additionally, there is objective medical evidence to  
14 support both a back impairment and hepatitis C; thus, Plaintiff has  
15 satisfied the first prong *Smolen*.

16 Plaintiff contends the ALJ's list of her daily activities of  
17 watching television with frequent changes of position, visiting with  
18 family, doing light household chores, grocery shopping with her  
19 sister, driving short distances, and reading at the library, are not  
20 inconsistent with disability. If a claimant can spend a substantial  
21 part of the day engaged in the performance of physical activity  
22 which is transferable to a work setting, such a finding is  
23 sufficient to discredit allegations of disability. *See Morgan*, 169  
24 F.3d at 599-600, citing *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir.  
25 1989). Moreover, a claimant should not be penalized for attempting  
26 to maintain some sense of normalcy in her life. *Reddick v. Chater*,  
27 157 F.3d 715, 723 (9<sup>th</sup> Cir. 1998); see also *Cohen v. Secretary of*

1 *Dept. of Health & Human Servs.*, 964 F.2d 524, 530 (6th Cir. 1992);  
2 *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir.1987)(noting that a  
3 disability claimant need not "vegetate in a dark room" to be deemed  
4 eligible for benefits); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.  
5 1989) ("[m]any home activities are not easily transferable to . . .  
6 the more grueling environment of the workplace, where it might be  
7 impossible to periodically rest or take medication"). Only if the  
8 level of activity were inconsistent with the claimant's claimed  
9 limitations would these activities have any bearing on credibility.  
10 *Id.*

11       The daily activities enumerated by the ALJ (watching  
12 television, working crossword puzzles, reading at the library, doing  
13 simple household chores, grocery shopping, and driving short  
14 distances) are not inconsistent with disability. Although the ALJ  
15 found Plaintiff was able to sleep without difficulty, failed to  
16 report nausea to her physician, had no problems concentrating, and  
17 made inconsistent statements regarding her need to nap (due either  
18 to fatigue or back pain), these reasons, by themselves, are not  
19 sufficiently clear and convincing to reject her testimony. However,  
20 this court is unable to credit her testimony as a matter of law in  
21 light of the contrary medical findings by Dr. Scaduto, and evidence  
22 of chronic narcotic pain medication (Vicodin, which produces side  
23 effects, including narcotic dependence, nausea and sedation).  
24 Additionally, the record indicates Plaintiff was providing care for  
25 her mother to the extent she strained her back while moving her in  
26 August 1999. (Tr. at 215.) Finally, Plaintiff's date of last  
27 insured did not expire until December 31, 2001; thus, amendment of  
28

1 the onset date may result in an award of benefits if supported by a  
2 more recent medical record.<sup>3</sup> Accordingly,

3 **IT IS ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is  
5 **GRANTED IN PART**; the matter is **REMANDED** for additional proceedings  
6 pursuant to sentence four of 42 U.S.C. § 405(g).

7 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
8 **Rec. 12**) is **DENIED**.

9 3. Any application for attorney fees shall be filed by  
10 separate motion.

11 4. The District Court Executive is directed to file this  
12 Order and provide a copy to counsel for Plaintiff and Defendant.  
13 The file shall be **CLOSED** and judgment entered for Plaintiff.

14 DATED April 26, 2005.

15  
16 S/ CYNTHIA IMBROGNO  
17 UNITED STATES MAGISTRATE JUDGE  
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24 \_\_\_\_\_  
25 <sup>3</sup>If limited to sedentary work, Plaintiff would be disabled  
26 under the Grids as of August 2000; if limited to light work, she  
27 would not be disabled under the Grids. 20 C.F.R. Pt. 404, Subpt. P  
28 , App. 2, 201.12, 202.13.